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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE, Plaintiff and Respondent, v. ERNIE ANTHONY BALLADAREZ, Defendant and Appellant.	B213471 (Los Angeles County Super. Ct. No. MA042579)

APPEAL from a judgment of the Superior Court of Los Angeles County. Lisa M. Chung, Judge. Affirmed.

Jolene Larimore, under appointment by Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Paul M. Roadarmel, Jr., and Roy C. Preminger, Deputy Attorneys General, for Plaintiff and Respondent.

Appellant Ernie Balladarez was sentenced to seven years in state prison for assault with a deadly weapon with a prior serious felony conviction. He contends on appeal that insufficient evidence supports his conviction and that the trial court committed instructional and sentencing errors. We affirm.

FACTS

Appellant and Christine Balladarez have been married for 15 years and have two children together, Anthony (aged 15) and Natalie (aged 9). On June 20, 2008, Christine was standing outside her home chatting and drinking beer with their next door neighbor and another friend when appellant arrived. He went inside their home but later came outside and asked Christine if she was coming inside. She replied, "In a minute." Appellant went back inside the house. Soon thereafter, when Christine tried to enter the house, she found appellant had locked her out. She called the sheriff's department. They used their bullhorn and banged on the door, but were unable to force appellant to open the door. Christine then called John and Lisa Oganesyan, their former neighbors, for help. They pried off a board from the fence and she attempted to enter the house through the garage, but the door was locked. Christine ultimately managed to open a sliding glass door to enter the house. Intending to take the children to the Oganesyan's, Christine unsuccessfully attempted to wake Natalie. When she left Natalie's room, appellant confronted her and told her, "You're not going to take the kids." She said, "I am" and entered Anthony's room to wake him.

When she left Anthony's room, she again argued with appellant and as she backed away from him, he pushed her to the floor and onto her back. Appellant pulled an awl[1] from his pocket and thrust it at her once. He held the awl pointed about a foot from her neck; she was not able to get up because he kept it pointed there. When Christine told him that his daughter was in the room and saw what he was doing, he stepped away.

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[1] An awl is a pointed instrument for piercing small holes in leather, wood and other materials. (Webster's 9th New Collegiate Dict. (1989) p. 120.)

John Oganesyan came in soon after and got him away from Christine. The sheriff's department was called again and appellant was arrested.

Detective Chris Bergo interviewed appellant. Appellant said he argued with his wife about possible infidelity and locked her out. He admitted he grabbed her by the shoulders and placed her on the floor. He said he pulled a screwdriver from his pocket and thrust it at her once to scare her, not to stab her.

An information charged appellant in count 1 with assault with a deadly weapon. (Pen. Code, § 245, subd. (a)(1).)[2] It was further alleged that appellant personally used a deadly and dangerous weapon in connection with the crime (§ 12022, subd. (b)(1)); that he suffered a prior conviction within the meaning of the "Three Strikes" law (§§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d)); and that he sustained a prior serious felony conviction (§ 667, subd. (a)(1)). Appellant was also charged in count 2 with misdemeanor battery. (§ 243, subd. (e)(1).)

After trial by jury, appellant was found guilty of assault with a deadly weapon and not guilty of battery. The jury found the weapon use allegation to be true, but the trial court dismissed the finding because it is an element of the offense. Appellant admitted to the prior conviction and the trial court granted his motion to strike the prior conviction under the Three Strikes law. Probation was denied and appellant was sentenced to the low term of two years for the assault charge plus an additional five years for his prior conviction. Appellant timely appealed.

DISCUSSION

I. Sufficient Evidence Supports the Assault Charge

Appellant contends there was insufficient evidence to support a finding that he intentionally committed the required criminal act and possessed the requisite mens rea. More specifically, he contends: "Holding the awl some distance from Mrs. Balladarez, and making a thrusting motion towards her at some distance, under the circumstances of the encounter, was not an act which by its nature would 'directly and probably' result in

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[2] All further section references are to the Penal Code unless otherwise specified.

application of force to Mrs. Balladarez." Further, "[t]here were no facts shown to support any rational conclusion that appellant 'was aware of facts that would lead a reasonable person to realize that as a direct, natural and probable result of his act that physical force would be applied to another person.' " We disagree.

In assessing the sufficiency of the evidence, we view the entire record in the light most favorable to the judgment to determine whether substantial evidence—evidence which is reasonable, credible, and of solid value—exists for a reasonable trier of fact to find appellant guilty of assault with a deadly weapon beyond a reasonable doubt. (*People v. Raviart* (2001) 93 Cal.App.4th 258, 263.)

While the actus reus and mens rea are two separate elements of a crime, our analysis in this case can be combined because the elements are related. As the California Supreme Court explained: "[I]t is clear that the question of intent for assault is determined by the character of the defendant's willful conduct considered in conjunction with its direct and probable consequences. If one commits an act that by its nature will likely result in physical force on another, the particular intention of committing a battery is thereby subsumed. Since the law seeks to prevent such harm irrespective of any actual purpose to cause it, a general criminal intent or willingness to commit the act satisfies the mens rea requirement for assault." (*People v. Colantuono* (1994) 7 Cal.4th 206, 217.) The court added, "An assault occurs whenever ' "[t]he next movement would, at least to all appearance, complete the battery." ' [Citation.] Thus, assault 'lies on a definitional, not merely a factual, continuum of conduct that describes its essential relation to battery: An assault is an incipient or inchoate battery; a battery is a consummated assault.' [Citation.]" (*People v. Williams* (2001) 26 Cal.4th 779, 786 (*Williams*); *Colantuono*, at p. 216.) "A defendant who honestly believes that his act was not likely to result in a battery is still guilty of assault if a reasonable person, viewing the facts known to defendant, would find that the act would directly, naturally and probably result in a battery." (*Williams*, at p. 788, fn. 3.) In *People v. Tran* (1996) 47 Cal.App.4th 253, 262, for example, the court held that chasing a man while brandishing an 18-inch knife

constituted an assault on both the intended victim and a baby being carried by that victim, even though there was no intent to harm the child. (*Ibid.*)

Here, the evidence is undisputed. Appellant argued with his wife and locked her out of the house. When she later found a way in, he pushed her to the ground as she was backing away from him. She could not get up; appellant had thrust a sharp pointed instrument, an awl, at her. He pointed the awl at her neck; it was within arm's length of her neck. These facts taken together constitute more than substantial evidence to fulfill the actus reus requirement for assault with a deadly weapon. We reject appellant's characterization of the event as a "restraining activity" in which the awl was at a "safe distance" such that it was "unlikely" it would touch his wife.

That appellant may not have intended to hurt his wife and stepped away from her when he realized his daughter was in the room does not negate this evidence. Appellant's subjective intent has no bearing on the general intent requirements of an assault charge. (*Williams, supra,* 26 Cal.4th at p. 788, fn. 3.) The question is not whether appellant realized a battery would directly, naturally and probably result from his conduct, but whether a reasonable person would. The facts here are sufficient to lead a reasonable person to find that appellant's acts would directly, naturally and probably result in a battery. Substantial evidence supports the jury's verdict.

We disagree with appellant that his lack of awareness that his conduct posed a danger to his wife was similar to that in *Williams, supra,* 26 Cal.4th at page 788 and *In re Gavin T.* (1998) 66 Cal.App.4th 238. In both *Williams* and *Gavin T.*, the defendants did not know the victims were in the area and thus, they lacked knowledge that would lead a reasonable person to find their acts to "directly, naturally and probably" lead to a battery. The circumstances presented in *Williams* and *Gavin T.* bear no similarity to appellant's case.

II. The Jury Instructions Were Proper

Appellant next contends the jurors were given confusing instructions on the mens rea element of the assault with a deadly weapon charge. Here, the jury was instructed with CALCRIM No. 875, which reads in relevant part:

> "To prove that the defendant is guilty of [assault with a deadly weapon], the People must prove that: [¶] 1. The defendant did an act with a deadly weapon that by its nature would directly and probably result in the application of force to a person; [¶] 2. The defendant did that act willfully; [¶] 3. When the defendant acted, he was aware of facts that would lead a reasonable person to realize that his act by its nature would directly and probably result in the application of force to someone; [¶] AND [¶] 4. When the defendant acted, he had the present ability to apply force with a deadly weapon to a person. [¶] Someone commits an act *willfully* when he does it willingly or on purpose. It is not required that he intend to break the law, hurt someone else, or gain any advantage. [¶] . . . [¶] The People are not required to prove that the defendant actually intended to use force against someone when he acted."

CALCRIM No. 250 was also given, which instructs the jury that "to find a person guilty of the crimes in this case, that person must not only commit the prohibited act, but must do so with wrongful intent. A person acts with wrongful intent when he intentionally does a prohibited act, however, it is not required that he intend to break the law."

While acknowledging that the jury instructions correctly state the law, appellant contends our Supreme Court's efforts to define the mens rea for assault have resulted in unnecessary confusion, which is reflected in the jury instructions. According to appellant, "Instruction 875, which permitted the People to make their argument that what appellant intended was of no consequence, resulted in prejudice to [him]. The other instruction given does require a certain mental state, defined in CALCRIM 250 as a 'wrongful intent'. And, instruction 875 requires proof of an intentional doing of a certain act with specific knowledge of the nature of the act. It is simply too confusing to the jurors to instruct them in these contradictory instructions, and then to allow the People's argument that appellant's mental state had no relevance to his guilt." As a result, appellant claims, the jury was instructed it could convict him based on negligence or strict liability, regardless of his actual intent.

Contrary to appellant's contention, we see no inherent conflict in those instructions. The intent described in both CALCRIM Nos. 250 and 875 relate to an intent to commit the prohibited act, not an intent to harm someone else. To the extent appellant

wants us to impose a specific intent requirement on the jury instructions for assault, that issue has been resolved against him by our Supreme Court. (*Williams, supra*, 26 Cal.4th 779; see also *People v. Wright* (2002) 100 Cal.App.4th 703, 705 (*Wright*).) We also find no confusion between the prosecution's argument at closing and the instructions given to the jury. Appellant mischaracterizes the prosecution's argument. The prosecution did not merely argue that appellant's intent was not relevant *at all*. Instead, he correctly argued that it was irrelevant whether appellant intended to harm his wife or break the law.

Appellant relies on the Third District's opinions in *Wright, supra*, 100 Cal.App.4th at page 705 and *People v. Smith* (1997) 57 Cal.App.4th 1470, both of which resist the Supreme Court's holding in *Williams.* We are bound by the high court's ruling, as the Third District acknowledged in its opinions as well. (*Wright*, at p. 705; *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.) Accordingly, we turn to *Williams* for guidance rather than *Wright* or *Smith*. In *Williams*, the court considered a jury instruction substantially similar to CALCRIM No. 875 and found it potentially ambiguous for the reason that "a jury could conceivably convict a defendant for assault even if he did not actually know the facts sufficient to establish that his act by its nature would probably and directly result in a battery." (*Williams, supra*, 26 Cal.4th at p. 790.) Our Supreme Court found that "any instructional error is largely technical and is unlikely to affect the outcome of most assault cases, because a defendant's knowledge of the relevant factual circumstances is rarely in dispute." (*Ibid*.)

In *Williams*, the defendant admitted he fired a warning shot from a shotgun at a truck even though he knew the victim was in the vicinity. *Williams* affirmed the conviction of assault with a deadly weapon, saying: "In light of these admissions, defendant undoubtedly knew those facts establishing that his act by its nature would directly, naturally and probably result in a battery." (*Williams, supra*, 26 Cal.4th at p. 790.)

Similarly, if there were any confusion or ambiguity contained in the instructions given in this case, it was harmless. Appellant undoubtedly knew that he had pushed his wife to the ground, thrust an awl toward her neck and held it within arm's length of her

neck. These undisputed facts would lead a reasonable person to realize that such an act by its nature would directly and probably result in the application of force to someone.

III. Sentencing

Last, appellant argues the trial court abused its sentencing discretion by denying probation. We disagree.[3]

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[3] There is a conflict of authority as to whether a prior serious felony conviction pursuant to section 667, subdivision (a)(1) makes a defendant ineligible for probation. Division Six of this District has determined a trial court has no authority to grant probation where a defendant has suffered such a prior serious felony conviction. (*People v. Winslow* (1995) 40 Cal.App.4th 680 (*Winslow*).) There, the defendant was convicted of residential burglary and, as such, was presumptively ineligible for probation, absent unusual circumstances. (§ 462, subd. (a).) The defendant had also suffered a prior serious felony conviction within the meaning of section 667, subdivision (a)(1). The court stated: "While a first time residential burglar may be eligible for probation if the case is 'unusual,' a defendant convicted of residential burglary who is found to have suffered a prior 'serious felony' must be sentenced to state prison. Any other disposition would do violence to the letter and spirit of section 667, subdivision (a)(1)." (*Winslow*, at pp. 689-690.)

On the other hand, the Fourth District in *People v. Aubrey* (1998) 65 Cal.App.4th 279, 281 (*Aubrey*), reached the opposite conclusion and expressly disagreed with *Winslow*. There, the defendant plead guilty to first degree burglary and admitted both a prior conviction for attempted robbery, under the Three Strikes law (§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d)) and a prior serious felony conviction for the purposes of section 667, subdivision (a)(1). The trial court struck the prior conviction for the purposes of the Three Strikes law and sentenced the defendant to the low term of two years for the burglary and imposed an additional five-year sentence for the prior serious felony enhancement. Although the trial court indicated it was inclined to grant probation, it believed it lacked the discretion to do so because imposition of the enhancement was mandatory.

The *Aubrey* court looked to the plain language of the statute, which is silent about a prohibition against a grant of probation, and concluded the trial court did in fact have discretion to grant probation and reversed. (*Aubrey*, *supra*, 65 Cal.App.4th at p. 284.)

We conclude it unnecessary to weigh in on the issue because we find the trial court properly denied probation for a separate reason.

Here, appellant was presumptively ineligible for probation pursuant to section 1203, subdivision (e)(2). That section provides that where a felony is committed with the personal use or attempted use of a deadly or dangerous weapon, probation should only be granted "in unusual cases where the interests of justice would best be served. . . ." (§ 1203, subd. (e)(2).) Having been convicted of assault with a deadly weapon, appellant falls squarely within the purview of this proscription.

After due consideration of the parties' arguments, the sentencing court ruled as follows:

> "This is a very difficult decision because I think there are factors, and it is very close, and legitimate concerns coming out from both sides. [¶] As to Mr. Balladarez, I can't ignore the fact that his prior—and it was 16 years old, I acknowledge it is remote—concern[s] the crime of violence, attempted robbery with a use of a weapon, a BB gun. The facts were not domestic related. [¶] About a year after that, so we're talking a 15-year gap, he's on summary probation for driving under the influence. It's a high blood alcohol, 0.22 I noticed. [¶] There is the instant of this current offense. Obviously, it's a felony. It's a crime of violence and did involve the use of a dangerous weapon, an awl. The victim was not seriously injured, but accountability is one of the things the court has to take in mind. [¶] . . . [¶] Twenty-year marriage, doesn't seem to be any prior incidences documented or otherwise that came out. . . . [¶] I do note today the presence of strong family support from his wife, the victim in this case; the children and other family members that I acknowledge; and that they would be willing to take him back. And the court finds that it's to his credit and to his character. [¶] . . . [¶]
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> "In [striking the strike pursuant to appellant's motion], I am also taking into account the potential punishment. Sentencing is never a happy occasion. There ha[ve] been previous probationary grants. In taking this into consideration, with the same factors that I cited, the court is not comfortable placing him on probation.
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> "I acknowledge that he does have serious health issues. I don't think that was disputed in the course of the trial, but these same health conditions were existing prior to the incident, and there is an issue of public safety, a claim and a charge of great violence.
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> "So the court is not indicating probation. But for the mitigating factors that I've mentioned that helped form the basis of the strike, the court

is going to indicate low term. Consecutive to that, though, the five years [section] 667[, subdivision (a)](1)."

The trial court has broad discretion to determine whether a defendant is suitable for probation (*People v. Carbajal* (1995) 10 Cal.4th 1114, 1120), and we will reverse only upon a finding of abuse of discretion. (*People v. Edwards* (1976) 18 Cal.3d 796, 807.) It is apparent the trial court considered the factors specified under rule 4.414(a) of the California Rules of Court and found no exceptional circumstances justifying the grant of probation in this case. Appellant was convicted of a serious felony and had previously been convicted of a serious felony. Appellant was granted leniency when the trial court struck the prior conviction for purposes of the Three Strikes law. Under such circumstances, we cannot say that the decision to deny probation was arbitrary, whimsical or capricious.

DISPOSITION

The judgment is affirmed.

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BIGELOW, J.

We concur:

FLIER, Acting P.J.

MOHR, J.*

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* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.